Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RADIOFONE, INC.,
Petitioner

v.

LOUISIANA PUBLIC SERVICE COMMISSION,
CAMERON TELEPHONE COMPANY,
KAPLAN TELEPHONE COMPANY, INC.,
LOUISIANA TELEPHONE ASSOCIATION,
EAST ASCENSION TELEPHONE COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

ASHTON R. HARDY
Counsel of Record
JAMES J. POPHAM
FAWER, BRIAN, HARDY & ZATZKIS
2355 Pan American Life Center
601 Poydras Street
New Orleans, LA 70130
(504) 528-9500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the orders of the Louisiana Public Service Commission, affirmed by the Supreme Court of Louisiana, which permit land line telephone companies to provide mobile communications services beyond the geographical boundaries of their land line telephone service areas, without satisfying entry requirements applicable to similarly situated radio common carriers denies radio common carriers equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, U.S. CONST., amend. XIV.

2. Whether the orders of the Louisiana Public Service Commission, affirmed by the Supreme Court of Louisiana, deprived radio common carriers of property without due process of law in violation of the Fourteenth Amendment, U.S. CONST., amend. XIV, by adoption, without legally sufficient notice of its action or an opportunity for comment, a new rule of general applicability permitting land line telephone companies to provide mobile communications service without certification in areas where such service already was provided by a certificated radio common carrier.

LIST OF PARTIES

The following appeared as parties in the Louisiana Supreme Court proceeding below:

APPELLANTS:

Defendant-Appellant—

Southern Message Service, Inc.

Plaintiff-Appellant—

Gulf Central International, Inc.

Intervenor-Appellant—

Radiofone, Inc.

APPELLEES:

Defendants Appellees—

Louisiana Public Service Commission

Defendants Appellees—

Kaplan Telephone Company, Inc.

Defendants Appellees—

East Ascension Telephone Company, Inc.

Plaintiff Appellee—

Cameron Telephone Company

Intervenor Appellee—

Athens Telephone Company, Inc.

Louisiana Telephone Association

Caddoan Telephone Co., Inc.

Central Louisiana Telephone Company, Inc.

Century Telephone Company, Inc.

Coastal Telephone & Electronics Corporation

Evangeline Telephone Company

Louisiana Western Telephone Company

Northwestern Louisiana Telephone Company, Inc.
Plain Dealing Telephone Company, Inc.
United Telephone Company of Louisiana, Inc., and
Union Telephone Company, Inc.

The parties in the consolidated proceeding in the Nineteenth Judicial District Court, were as follows:

APPELLANTS:

Cameron Telephone Company
Gulf Central International, Inc.

APPELLEES:

Louisiana Public Service Commission
Southern Message Service, Inc., and
Kaplan Message Service, Inc.

INTERVENORS:

Radiofone, Inc.
Athens Telephone Company, Inc.
Caddoan Telephone Co., Inc.
Central Louisiana Telephone Company, Inc.
Century Telephone Company, Inc.
Coastal Telephone & Electronics Corporation
Evangeline Telephone Company
Louisiana Western Telephone Company
Northwestern Louisiana Telephone Company
Plain Dealing Telephone Company, Inc.
United Telephone Company of Louisiana, Inc., and
Union Telephone Company, Inc.
East Ascension Telephone Company, Inc.

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LOUISIANA PUBLIC SERVICE COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner, Radiofone, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana in this case.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at 440 So.2d 694 (La. 1983) and is attached hereto in the Appendix at 1a-21a. The denial of rehearing by the Louisiana Supreme Court is noted with the case as reported, and the News Release (No. 136)

of the court reporting the denial of rehearing is attached hereto in the Appendix at 44a.

The decisions of the Louisiana Public Service Commission affirmed by the Supreme Court of Louisiana are as follows:

1. *Gulf Central International, Inc. v. Kaplan Telephone Company, Inc.*, Order No. U-14645 (August 4, 1981); and

2. *Southern Message Service, Inc. v. Cameron Telephone Co.*, Order No. U-14506-A (Amended) (October 26, 1981).

The above orders are not reported, but are set forth in the Appendix at 37a-43a.

The Judgment of the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, is as follows:

> *Cameron Telephone Company v. Louisiana Public Service Commission and Southern Message Service, Inc.*, No. 245,452 (Division "I"), *consolidated with Gulf Central International, Inc. v. Louisiana Public Service Commission and Kaplan Telephone Company, Inc.*, No. 215,352 (Division "I").

The case is not reported, but Written Reasons for Judgment (June 8, 1982) and the Judgment (December 3, 1982) are set forth in the Appendix at 22a-33a.

JURISDICTION

This Petition seeks review of a decision of the Supreme Court of Louisiana affirming two orders of the Louisiana Public Service Commission, which, Petitioner submits, deny Petitioner equal protection of the law and deprive Petitioner of property without due process of law in contravention with the Fourteenth Amendment, U.S. CONST., amend. XIV.

On October 17, 1983, the Louisiana Supreme Court entered judgment; it denied rehearing on December 9, 1983. Radiofone, Inc. invokes the jurisdiction of this Court under 28 U.S.C. § 1257(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, U.S. CONST., amend. XIV, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person equal protection of the laws.

This case also involves the Louisiana Radio Common Carrier Statute, LA. REV. STAT. ANN. § 45:1500 *et seq.*, the full text of which is set forth in the Appendix at 27a-30a.

STATEMENT OF THE CASE

Petitioner Radiofone, Inc., ("Radiofone"), seeks Review of a decision of the Louisiana Supreme Court affirming certain orders of the Louisiana Public Service Commission governing the provision of mobile common carrier communication services in the State of Louisiana. Such mobile services include one-way "paging" and two-way mobile telephone service which are interconnected with the land line telephone system.

In Louisiana, mobile communication services are provided on a common carrier basis by local land line telephone companies (*e.g.* South Central Bell) and entities individually known as radio common carriers "RCC's". Petitioner, Radiofone, Inc. ("Radiofone") is an RCC.

The Federal Communications Commission ("FCC") licenses both land line telephone companies and RCC's to use specific radio frequencies allocated for service in the Domestic Public Land Mobile Radio Service ("DPLMRS"). Certain frequencies are allocated for the exclusive use of land line telephone companies and certain other specified frequencies are reserved for exclusive use by RCC's.

Since 1976 the FCC has left the full responsibility for traditional regulation of entry, service, and rates in the DPLMRS to the separate states.

The Louisiana Radio Common Carrier Statute, LA. REV. STAT. ANN. § 45:1500 *et seq.* (West) [App. at 27a-30a] [hereinafter cited as "RCC Statute"], requires RCC's to obtain a certificate of public convenience and necessity from the Louisiana Public Service Commission (hereinafter "LPSC") and imposes stringent entry standards where an applicant seeks to compete or duplicate service with an existing certificated RCC.[1]

Whereas entities providing land line telephone service are expressly excluded from the scope of the RCC statute, the Louisiana Public Service Commission ruled in 1979 that:

> The statute did not contemplate allowing land line telephone companies the right to construct radio facilities outside its assigned land line telephone boundaries without seeking a certificate . . .

Radiofone v. LaFourche Telephone Company, Order No. U-13727-A (April 19, 1979) [hereinafter cited as

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[1] Section 1503 (C) of the RCC Statute, LA. REV. STAT. ANN. § 45:1503 (C) (West), permits entry of a second RCC into the market only upon a finding by the Louisiana Public Service Commission that "existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonable adequate service.

Latelco]. *See also Cameron Telephone Co. v. Louisiana Public Service Commission*, 440 So. 2d 694, 697 (La. 1983) [App. at 1a, 5a].

In 1980, the LPSC reaffirmed its interpretation of the RCC Statute and ordered Cameron Telephone Company to "discontinue activities to provide radio common carrier services in territory outside the geographical limits of its land line telephone system . . ." *Southern Message Service, Inc. v. Cameron Telephone Company*, Order No. U-14506 (March 27, 1980) [hereinafter cited as *SMSI*]. [App. at 34a, 36a]

On rehearing, the Louisiana Public Service Commission reaffirmed its interpretation of the RCC Statute, stating:

> That land line telephone companies may provide radio common carrier and paging service to any person residing or domiciled within the geographical limits of the land line telephone service area or subscribing to land line telephone service from the telephone company providing the radio common carrier or paging service without having received a certificate of public convenience and necessity from the commission.

Southern Message Service, Inc. v. Cameron Telephone Company, Order No. U-14506-A (January 9, 1981).

Cameron Telephone Company appealed that order to the state court.

Meanwhile, another land line telephone company, Kaplan Telephone Company, Inc., had filed a tariff with the LPSC seeking to provide service to customers located outside its geographical land line service area. Gulf Central International, Inc., an RCC certificated to provide service in that area complained. On April 24, 1981, the Official Bulletin of the Louisiana Public Service Commission included a notice as follows:

April 30, 1981, 9:30 a.m., Conservation Department Hearing Room, First Floor, State Land and Natural Resources Building, 4th and North Streets, Baton Rouge, Louisiana. Hearing examiner, Edward L. Gallegos.

Docket No. U-14645—Gulf Central International, Inc. v. Kaplan Telephone Company, Inc. In re: alleged operation of radio common carrier services outside authorized land line telephone area. *Cameron, supra*, 440 So.2d at 698 [App. at 8a].

Instead of applying the limitation enunciated in *SMSI* and *Latelco*, the LPSC exempted land line telephone companies from regulation under the RCC Statute with respect to provision of service "to any subscriber who believes that the effective range of the transmission will meet his needs." *Gulf Central International, Inc. v. Kaplan Telephone Company, Inc.*, Order No. U-14645 (August 4, 1981) [hereinafter cited as *Kaplan*] [App. at 42a]. The new standard was subject only to the proviso that the land line telephone company locate the transmitting tower for its mobile communication services at the exchange office of the telephone company or in close proximity thereto. *Id.* However, the LPSC also "grandfathered" existing towers already operated by land line telephone companies, regardless of their physical location. Thus, for the first time, the LPSC insulated land line telephone companies from the stringent entry requirements of the RCC Statute even where they were providing service to customers beyond the geographical limits of their land line telephone service areas in areas already served by a certificated RCC.

SMSI was remanded to the Commission at its request. Without notice or opportunity for the RCC complainant, Southern Message Service, Inc., to be heard, the LPSC amended its order to conform with the decision in *Kaplan*. Order No. U-14506-A (Amended) (October 26, 1981) [hereinafter cited as *Cameron II*].

As a result of the LPSC's orders, land line telephone companies may, for the first time in Louisiana, solicit mobile communications customers and provide mobile communications service in areas located outside the geographical boundaries of their land line telephone service areas without first obtaining a certificate of public convenience and necessity from the LPSC. If they wish to serve an area already served by an RCC, they need not meet any entry standard or obtain a certificate. In contrast, an RCC which desires to provide service in an area already served by another RCC must meet the stringent entry standards applicable to RCC's. Thus, an existing RCC's (already in competition with the *local* land line telephone company) may be subjected to immediate uncertificated competition from one or more adjacent land line telephone companies.

Southern Message Service, Inc. and Gulf Central International, Inc. appealed the orders of the Louisiana Public Service Commission in *Cameron II* and *Kaplan*, respectively. The cases were consolidated in the district court. Radiofone intervened, as did the numerous independent telephone companies and the trade association representing land line telephone companies. The Federal questions presented herein were initially raised before the district court on appeal of the orders of the LPSC. In its Petition for Appeal, Gulf Central International, Inc. (hereinafter "Gulf Central") alleged that the action of the LPSC "in changing and altering its long-standing established rules pertaining to the authority of telephone companies to serve as radio common carriers . . . was arbitrary, capricious and illegal . . . because such radical change was adopted in an unreasonable manner, without notice to appellant or other radio common carriers, giving them a reasonable opportunity to submit data or views and thus depriving appellant and others of due process of law." [2]

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[2] Petition of Appeal, filed November 2, 1981, by Gulf Central International, Inc. ("Gulf Central") at paragraph VII. B.

Because the Louisiana Public Service Commission offered no advance notice that it intended to depart from its established standard prohibiting land line telephone companies from offering mobile communication service beyond their land line areas, Radiofone had not sought to intervene in the proceedings before the LPSC. In its Petition for Intervention in the appeal to the state court, Radiofone alleged:

> The Louisiana Public Service Commission in this proceeding changed previously established policies in violation of the procedures established by its own rules of procedure, in violation of the procedures established by the Louisiana Administrative Procedure Act, in violation of fundamental and well-established principles of administrative law, in violation of the specific provisions of La. R.S. 45:1500 *et seq.*, and in violation of petitioner's constitutionally protected rights to due process of law.[3]

Radiofone also stated that the proceeding involved "whether the appellee, Kaplan Telephone Company, Inc. . . . must follow the requirements of law as set forth in La. R. S. 45:1500, *et seq.* . . . ." In its brief on the merits Radiofone stated:

> The United States Constitutional guarantee of equal protection of law likewise dictates similar regulation of land carriers entry into a market even if the available service is provided from existing facilities or new facilities located at or in close proximity to an exchange office.

On December 3, 1982, the district court rendered its judgment upholding and affirming the orders of the Louisiana Public Service Commission.[4] In its "Written

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[3] Petition for Intervention filed February, 1982 by Radiofone at paragraph VII.

[4] The district court on December 3, 1982 also granted a motion to reopen a case for further evidence permitted introduction of copies of the notices published by the Louisiana Public Service

Reasons for Judgment" the district court stated that "the decision of the LPSC was a proper regulation of the telephone companies under the Commission's plenary power." [App. at 26a]. The court did not specifically address the "due process" and "equal protection" arguments raised by Radiofone. The court, however, did state:

> The opinion issued by the LPSC was formulated after an adjudicatory hearing in which any affected or interested party could have intervened. *Id.*

Radiofone, Gulf Central, and Southern Message Service, Inc., appealed to the Supreme Court of Louisiana.

In its brief before the Supreme Court of Louisiana, Radiofone submitted its "Specification of Alleged Errors", which included the following:

* * * *

> 5. The Public Service Commission has denied Radiofone and similarly situated common carriers equal protection of the laws, as guaranteed by the U.S. Constitution, amendment XIV, and the Louisiana Constitution Art. 1, § 3.
>
> 6. The Public Service Commission deprived Radiofone and similarly situated RCC's of a property right without due process of law in violation of Louisiana Constitution Art. 1, § 2 and the United States Constitution, amendment XIV.

Radiofone's brief also included arguments with respect to both the "due process" and "equal protection" arguments.

In affirming the decisions of the LPSC, the Supreme Court of Louisiana passed on both issues. In response to Radiofone's "equal protection" argument the court distinguished this Court's decision in *Frost v. Oklahoma Corporation Commission*, 278 U.S. 515 (1929) on the basis of "real and substantial differences" between radio common

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Commission in advance of the proceedings and orders subject to review.

carriers and land line telephone companies. *Cameron, supra*, 440 So.2d at 703 [App. at 18a].

The Louisiana Supreme Court also ruled that the LPSC "complied with the due process requirements applicable to the parties in the cases below." *Id.*, 440 So. 2d at 704 [App. at 20a].

The court stated:

> There was adequate notice and a hearing held. Through publication in the Official Bulletin, others would be apprised of the general subject matter of the proceeding, and their intervention would have been permitted under Public Service Commission Rules. *Id.*

On October 31, 1983, Radiofone timely filed an Application for Rehearing. Radiofone reiterated its claim of discriminatory effect on radio common carriers and the resultant denial of equal protection. Radiofone also urged the rehearing and review of the court's decision respecting the adequacy of notice provided by the LPSC.

On December 9, 1983, the Supreme Court of Louisiana denied rehearing, but noted that three Justices had voted for a rehearing.[5]

REASONS FOR GRANTING THE WRIT

I. The Decision of the Louisiana Supreme Court Conflicts With Applicable Decisions of This Court Under the Equal Protection Clause of the Fourteenth Amendment Because the Administrative Classification Affirmed by the Louisiana Supreme Court is Arbitrary and Irrational Vis-A-Vis the Purpose of the Underlying Statute.

The decision of the Louisiana Supreme Court is in direct conflict with this Court's decision in *Frost v. Cor-*

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[5] The announcement of the Louisiana Supreme Court's denial of rehearing is set forth in the Appendix at 44a.

poration Commission of Oklahoma, 278 U.S. 515 49 S.Ct. 236, 73 L.Ed. 483 (1929). [Hereinafter cited as *Frost*.] Furthermore, when tested by the applicable standard announced in more recent decisions applying the "equal protection" clause of the Fourteenth Amendment to state economic regulation, the actions of the Louisiana Public Service Commission (LPSC), as affirmed by the Louisiana Supreme Court, discriminate in a constitutionally impermissible manner.

In *Frost* this Court invalidated an Oklahoma statute on equal protection grounds because it required individuals entering the cotton ginning business to make a showing of public necessity for their businesses, while relieving certain for-profit corporations of the need to make such a showing. Stated the Court:

> Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences, having reasonable relation to the subject dealt with by the legislation

Frost, *supra*, 278 U.S. at 524-525, 49 S.Ct. at 239. [citations omitted].

The facts in *Frost* and those of the present case are virtually identical. In *Frost*, Oklahoma law declared cotton gins public utilities, and the State Corporation Commission was empowered to control and fix rates charged by cotton gins. Radio Common Carriers also are treated as public utilities, and their rates are controlled in Louisiana by the LPSC. *Cameron*, *supra*, 440 So.2d at 696-7.

[App. at 3a, 4a] Operation and rates of telephone companies also are regulated by the LPSC. *Id.* In *Frost* no gin could be operated without a license from the Commission, and issuance of a license was dependent upon a showing of public necessity. *Frost, supra*, 278 U.S. at 517, 49 S.Ct. at 236. Similarly, RCC's also must receive certificates of public convenience and necessity from the LPSC in order to provide service. LA. REV. STAT. ANN. § 45:1503(c) (West); *Cameron, supra*, 440 So.2d at 697 [App. at 4a, 5a]. In cases other than those within the exception established by the Public Service Commission and affirmed by the Louisiana Supreme Court in this case, land line telephone companies are required to obtain a certificate of public convenience and necessity to provide mobile communications services (like those provided by RCC's) beyond their land line telephone service areas. *Radiofone v. LaFourche Telephone Company*, LPSC Order No. U-13727-A (April 19, 1979), cited in *Cameron, supra*, 440 So.2d at 697 [App. at 5a]. Both the appellant cotton gin owner in *Frost* and *Radiofone* in the present case have been granted certificates of public convenience and necessity to operate in their respective areas. *Frost, supra*, 278 U.S. at 417, 49 S.Ct. at 236.

In *Frost*, the proviso to the Oklahoma statute which was struck down permitted issuance of a license to certain cooperatively operated cotton gins without a showing of public necessity. *Id.* The action of the LPSC upheld by the Louisiana Supreme Court in the present case permits telephone companies in certain circumstances to solicit customers to provide service in an area already served by an RCC (as well as the local land line telephone company) without first obtaining a certificate of public convenience and necessity from the LPSC. *Kaplan, supra* [App. at 40a]; *Cameron, supra*, 440 So.2d at 698-9 [App. at 9a].

In *Frost*, the suspect distinction was between an individual, who was "forbidden to engage in business unless he can first show a public necessity in the locality for it," and a corporation, which could "engage in business in the same locality no matter how extensively the public necessity may be exceeded." *Frost*, *supra*, 278 U.S. at 523. In *Frost*, the court found "no real or substantial differences, having reasonable relationship to the subject dealt with by the legislation."

The difference in the present case is between a firm other than a land line telephone company which provides mobile communication service to the public, and a firm which provides radio common carrier service to the public, but also provides local telephone service in a given geographical area. Both provide mobile communications service to the public and interconnect that mobile service with the local telephone company facilities. *Cameron*, *supra*, 440 So.2d at 695 [App. at 2a]. As in *Frost*, "both are doing the same business with the general public and to the same end, namely, that of reaping profits." *Frost*, *supra*, 278 U.S. at 524, 49 S.Ct. at 239. The Louisiana Supreme Court expressly recognized that "the service provided to the customer is essentially the same." *Cameron*, *supra*, 440 So.2d at 696 [App. at 2a].

Under either the test enunciated in *Frost* or that enunciated in more modern equal protection cases, the discrimination between telephone companies providing mobile communications service and RCC's providing mobile communications service denies RCC's "equal protection of the laws" in contravention of the Fourteenth Amendment, U.S. CONST., amend. XIV. In *Frost*, this Court applied the following test:

> [T]he classification, in order to be valid, "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Frost, supra, 278 U.S. at 522, 49 S.Ct. at 238 [citations omitted]. Modern jurisprudence of this Court applies a similar "rational basis" test. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 464 (1981); *see, also, Vance v. Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). As stated in *Zobel v. Williams*, 457 U.S. 55, 60 (1982), "a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose."

The actions of the Louisiana Public Service Commission in the present case not only fail to further the purposes of the underlying statute, but frustrate achievement of those purposes. The Louisiana Radio Common Carrier Statute, LA. REV. STAT. ANN. § 45:1503(c) (West), imposes a stringent entry standard to carry out "the obvious legislative intent to avoid unnecessary competition and duplication of facilities in this area of regulated communications." *Southern Message Service, Inc. v. Louisiana Public Service Commission*, 370 So.2d 874, 878 (1979); *see also, Cameron, supra*, 440 So.2d at 697 [App. at 5a]. Indeed, the Louisiana Supreme Court has specifically recognized that "the Commission should refuse to permit a utility to invade territory occupied by another utility furnishing adequate service at reasonable rates." *Id.*, 370 So.2d at 880.

The decision of the Louisiana Supreme Court is self-contradictory. It acknowledges and embraces the benefits of entry regulation, but approves administrative actions which allow and encourage duplicative and wasteful services which threaten the consuming public with "inadequate service and higher rates." *Southern Message Service, Inc. v. Louisiana Public Service Commission, supra*, 370 So.2d at 880.[6]

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[6] The rationale for permitting land line telephone companies to provide service within the boundaries of their geographical land line service areas does not apply when the telephone company seeks to provide service beyond those boundaries. Landline telephone

The Supreme Court of Louisiana acknowledged expressly the Commission's interpretation that land line telephone companies operating outside their boundaries would be subject to the entry requirements of the RCC Statute. It explicitly concluded that:

> "[T]he public policy evident in the radio common carrier statute against unnecessary competition and duplication of services supersedes the literal exemption granted to land line telephone companies."

Cameron, supra, 440 So.2d at 702 [App. at 16a].

In affirming the decisions of the LPSC, the court permitted evisceration of the very public policy enunciated and approved in the decision itself. It has permitted land line telephone companies to actively solicit customers and provide service beyond their land line areas in competition with local RCC's without satisfying the entry standards which would be applicable to an RCC seeking to provide the same service. As a result of the Commission's decisions, an RCC which provides service in a given geographic area now may be subject to competition not only from the local land line telephone company in that area, but also from other land line telephone companies in adjacent geographic areas. Indeed, the effect of competition from mobile communications service provided by a telephone company, while no different in nature from the effect of competition from another RCC, may be greater in degree.

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companies have been exempted from entry regulation when providing mobile communications services within their geographical land line areas in order to permit them to provide a "full range of communications services to [their] customers." *Cameron, supra*, 440 So.2d at 702 [App. at 16a]. Individuals residing outside the geographical service area of the land line telephone company are not and cannot be customers of the telephone company's land line service. Therefore, the rationale for the exemption, "full service to customers . . ." does not justify a decision to allow land line companies to solicit mobile communications customers beyond their land line areas.

In some circumstances, several adjacent land line telephone companies would be permitted to solicit customers in the certificated RCC's area, thereby compounding the duplication and waste resulting from unregulated open entry. Therefore, rather than furthering the purposes of the statute, the LPSC decisions frustrate their achievement. They hardly can be said to "rationally" further a legitimate state purpose. *Zobel v. Williams, supra; Minnesota v. Cloverleaf Creamery Co., supra.*

In its decision, the Louisiana Supreme Court attempts to distinguish telephone companies from radio common carriers to avoid the obvious holding of *Frost. Cameron, supra*, 440 So.2d at 703 [App. at 18a]. Its reliance on this distinction is misplaced. With respect to the provision of mobile communications services, the court itself recognized that the entities are treated on the same basis beyond the geographical boundaries of the land line telephone companies' service areas. *Id.*, 440 So.2d at 702.

The lone rationale offered by the Louisiana Supreme Court for permitting land line telephone companies to allow other than land line customers to obtain the land line company's mobile communications services is specious and arbitrary in light of the purposes of the RCC Statute, LA. REV. STAT. ANN. § 45:1500 *et seq.* (West). The Court pointed to evidence of record to support the LPSC's conclusion that the public interest would be served because some members of the public found that the proffered service met their needs. The Court's rationale, however, utterly fails to justify or provide any basis whatsoever for the distinction made by the LPSC between land line telephone companies and radio common carriers. Whereas it might justify permitting both radio common carriers and adjacent land line telephone companies to provide service without first making a showing of public need, it leaves unstated any conceivable justification for the *distinction*. Again, it is the distinction which must

rationally further a legitimate state purpose. *Zobel v. Williams, supra*, 457 U.S. at 60.

As in *Zobel*, the distinction in the present case is not justified by this lone rationale. Indeed, that rationale is not a rationale which flows from the RCC Statute, but a separate rationale which clashes with the basic purpose of the statute. Had the Louisiana Legislature chosen open, unfettered competition in the provision of mobile communications services, then the court's rationale might be justifiable. However, in enacting the RCC Statute, the Louisiana Legislature chose to regulate the provision of mobile communications services. Confronted with the statutory decision to so regulate, the Court cannot justify lifting the regulatory burden in a discriminatory fashion.

In sum, actions of the LPSC distinguishing between radio common carriers which wish to expand their service into areas already served by another radio common carrier and land line telephone companies which to do the same is not rationally related to achievement of the purposes of the Radio Common Carrier Statute. Therefore, the distinction drawn denies radio common carriers equal protection of the laws, in contravention of the Fourteenth Amendment, U.S. CONST., amend. XIV.

II. The Decision of the Supreme Court of Louisiana Upholding Orders of the Louisiana Public Service Commission Announcing a New Rule of General Applicability Without Adequate Notice to Affected Parties Deprives Radio Common Carriers of Due Process of Law in Conflict with Applicable Decisions of this Court.

The actions of the LPSC affirmed by the Louisiana Supreme Court permit land line telephone companies to duplicate service provided by RCC's in Louisiana.[7] Radio-

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[7] The Louisiana Supreme Court has ruled that the Louisiana Public Service Commission is not subject to the Louisiana Administrative Procedure Act. *Louisiana's Consumers League, Inc. v.*

fone and other similarly situated radio common carriers have been certificated to provide the service and the orders of the LPSC deprive Radiofone and other RCC's of the right to provide service without threat of illegal competition. Under the applicable decisions of this Court and the federal courts of appeal, the manner in which the LPSC acted deprived Radiofone of this right without due process of law in contravention of the United States Constitution, U.S. CONST., amend XIV.

Specifically, the LPSC reached its decision with no prior notice to Radiofone or other similarly situated RCC's and without affording opportunity for the RCC's to comment on or to object to the LPSC's action. Radiofone and other RCC's were given no legally sufficient notice that the LPSC contemplated reversing its established practice and adoption of a new rule which permitted the land line telephone companies to provide service beyond their land line areas in areas already served by radio common carriers without complying with otherwise applicable entry requirements.

The notice announcing the *Kaplan* hearing, which ultimately resulted in the LPSC's changing its rule, indicated only "alleged" operation of mobile communications service beyond the telephone company's land line area.[8] Nowhere and in no way did this notice even suggest that the Commission would depart from its established practice of restricting the provision of mobile communication service

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Louisiana Public Service Commission, 351 So.2d 128 (La. 1977). The court has ruled that procedures employed by the Public Service Commission be reasonable. *Id.* Consequently, this case provides this Court an opportunity to define due process requirements for state administrative agencies not subject to specific requirements of an Administrative Procedure Act.

[8] The actual notice appears at Gulf Central Docket No. U-14645, Official Bulletin No. 201, April 24, 1981, and in the decision of The Louisiana Supreme Court. *Cameron, supra*, 440 So.2d at 698 [App. at 8a].

by telephone companies to the land line companies' land line areas. The notice informed no one (not even the parties to the proceeding) that new, widespread, uncertificated duplication of services by land line telephone companies might for the first time be permitted. Because the notice provided no indication of the Commission's intended course of action, Radiofone and other RCC's not directly in competition with the proposed service of the Kaplan Telephone Company did not intervene. They were entitled to rely on the LPSC to maintain and apply its then-existing standard in the absence of notice to the contrary. Radiofone provides mobile communication services in Baton Rouge, Louisiana and relied on the LPSC's established practice in determining not to oppose an application filed by the East Ascension Telephone Company to construct a radio transmitter at the fringe of its land line area near Baton Rouge. Radiofone relied on the LPSC's standard which prevented use of that facility to provide service to areas outside of the East Ascension Telephone Company's land line area, but within the area served by Radiofone in and around Baton Rouge.[9]

As a result of the LPSC's orders, Radiofone now is subject to competition in the heart of its service area, the city of Baton Rouge, from East Ascension Telephone Company, as well as from South Central Bell, which provides land line telephone service in the Baton Rouge area. Similarly, telephone companies in the contiguous parishes of West Baton Rouge, Livingston, and Iberville also may introduce duplicative services in the Baton Rouge area.

Had Radiofone been apprised of the Commission's intention to develop a new standard and apply it not only

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[9] Notably, neither the *Cameron* nor *Kaplan* cases involved the provision of service to a major metropolitan community. In larger communities and cities, the effect of the LPSC decision will be more substantial.

in the *Kaplan* case, but also in other existing situations, it would have intervened and presented evidence of the destructive effect of duplicative service in the *Kaplan* case.[10] However, Radiofone had no way of knowing that its rights would be so substantially affected by the LPSC's action.

Under applicable decisions of this Court, the procedure employed by the LPSC deprived Radiofone of property without due process of law.[11] In *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865, this Court ruled that "deprivation of life, liberty or property by adjudication must be preceded by notice and opportunity for hearing *appropriate to the nature of the case.*" [Emphasis supplied.] As further stated by this court in *Memphis Light, Gas and Water Division v. Kraft*, 436 U.S. 1, 15, 98 S. Ct. 1554, 1563, 56 L. Ed.2d, 30 (1978) [emphasis supplied]:

> The purpose of notice under the due process clause is to apprise the affected individual of, *and permit adequate preparation for*, an impending "hearing."

Given the nature of the action taken by the Public Service Commission, the content of the notice was totally inadequate. As recognized by the Supreme Court of Louisiana:

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[10] Not only did the Commission set forth its rule as one of general applicability, it also announced a "grandfather" provision which permits service beyond the land line telephone companies' geographical service area regardless of the location of their mobile communication transmission towers. Again, RCC's all across the State of Louisiana may be affected.

[11] A non-exclusive franchise subjected to illegal, non-franchised competition has been deprived of a property right subject to the requirements of due process. As stated by this Court in *Frost, supra*, 278 U.S. at 520, 49 S. Ct. at 237, "a franchise granted by the state in consideration of the performance of a public service . . . constitutes a property right within the protection of the Fourteenth Amendment.

> The decision required of the Commission [LPSC] in these complaints involves complex matters having far-reaching effects on the radio communications industry. . . . *Cameron, supra*, 400 So.2d at 701 [App. at 15a].

A notice which fails to apprise entities which stand to be substantially affected by the LPSC's decision of the LPSC's intention to consider reversing its existing standard hardly can be considered adequate.

The Louisiana Supreme Court observed that the LPSC's Official Bulletin apprised others of "the general subject matter of the proceeding, and their intervention would have been permitted. . ." *Cameron, supra*, 440 So.2d at 704 [App. at 20a]. If the public and the regulated industry are not informed that a rule change is anticipated or even contemplated, they cannot reasonably be expected to make themselves parties to the proceeding before the Commission. Indeed, intervention in every complaint proceeding generally noticed by the Commission is neither practicable nor reasonably possible. Moreover, while Radiofone could technically have intervened, it was not on notice of any need to do so. It had no notice that its rights in its area of service might be affected.

Decisions of federal courts of appeal leave no doubt that rules of general applicability must be adopted pursuant to procedures which include notice and an opportunity for interested parties to comment. The pronouncements by the LPSC in *SMSI* and *Kaplan* have all the attributes of rules and must be considered as such. It is not the label, but what the agency actually does that determines the proper characterization of its action. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S. Ct. 1194 (1942). The provision adopted by the LPSC in *Kaplan* contains all the elements of a rule. They are stated as generally applicable rules. They apply in the future without further administrative action. They established substantive rights of the land line companies, relieving them of the burden of complying with entry

requirements applicable to RCC's wishing to serve the same area. Adjudication may not be used as a substitute for substantial legislative rule making. *Human Resources Management, Inc. v. Weaver*, 442 F. Supp. 241 (D.D.C. 1977). When an agency action has "palpable affects" on the regulated industry, its action should be "exposed to the test of prior examination and comment." *Standard Oil Company v. Department of Energy*, 596 F.2d 1029, 1061 (Em. App. 1978), *citing National Helium Corporation v. Federal Energy Administration*, 569 F.2d 1137, 1145-46 (Em. App. 1977).

Radiofone and other RCCs' rights to provide service free of illegal competition are substantially diminished by the action of the LPSC. Radiofone, however, never had an opportunity to present evidence, views and objections to the LPSC because it had no notice that its rights would be affected by the LPSC's actions. It now finds itself subject to competition from numerous land line telephone companies providing mobile communication services to customers outside their land line areas without benefit of any hearing. Consequently, these actions cannot withstand the test of the Fourteenth Amendment requirement of "due process" as interpreted and previously applied by this Court.

CONCLUSION

Wherefore, for the reasons set forth above Radiofone respectfully prays that its Petition be granted and that a Writ for Certiorari issue to review the Judgment of the Supreme Court of Louisiana on this case.

Respectfully submitted,

ASHTON R. HARDY
Counsel of Record
JAMES J. POPHAM
FAWER, BRIAN, HARDY & ZATZKIS
2355 Pan American Life Center
601 Poydras Street
New Orleans, LA 70130
(504) 523-9500

APPENDIX

APPENDIX

SUPREME COURT OF LOUISIANA

No. 83-CA-0037

CAMERON TELEPHONE COMPANY

versus

LOUISIANA PUBLIC SERVICE COMMISSION and
SOUTHERN MESSAGE SERVICE, INC.

Consolidated With

GULF CENTRAL INTERNATIONAL, INC.

versus

LOUISIANA PUBLIC SERVICE COMMISSION and
KAPLAN TELEPHONE COMPANY, INC.

On Appeal from the
Nineteenth Judicial District Court,
Parish of East Baton Rouge, Louisiana
Honorable William H. Brown, Judge

DIXON, Chief Justice

This appeal from the Nineteenth Judicial District Court is to review two rulings of the Louisiana Public Service Commission.

1. Background

A brief review of the "land mobile communications" business and technology is necessary to understand the rulings of the commission and the positions of the parties in this case.

Telephone service is normally provided by direct wire connection between the subscriber and the telephone com-

pany. The telephone company operates telephone exchanges which allow connections to be made between subscribers. Connections are also made between exchanges to allow subscribers access to other telephone subscribers throughout the world. Such telephone companies are called "land line telephone carriers."

The direct wire connection may be replaced with radio communication, allowing the subscriber to have a mobile telephone with two-way communication with the telephone company. Alternatively, the subscriber could arrange for one-way communication from the telephone company to a "beeper" which may allow voice communication in addition to the beep tone. Mobile telephone service and radio paging are forms of "land mobile communications."

Land mobile communications can be provided by both land line telephone companies and by independent companies known as "radio common carriers" which are in turn connected to the land line telephone company. Though land line telephone companies and radio common carriers operate on different ranges of radio frequencies assigned by the Federal Communications Commission, the service provided to the customer is essentially the same.

With one-way (paging) service the subscriber desiring to contact the subscriber wearing the beeper calls the designated number for the particular beeper. The call is routed to the telephone company's transmitter (in the case where the land line company provides the service) or to the radio common carrier's transmitter (in the case where the radio common carrier provides the service) and the signal is sent. If the beeper is within the range of the transmitter, the signal is received. The process is essentially the same for mobile radio service, except that the call can originate from mobile telephones and sustained communication is achieved.

2. Regulation

While the FCC licenses the use of specific frequencies for land mobile communication operators, regulation of market entry, service and rates has been left to the states. In Louisiana, the land mobile communications industry is regulated by the Louisiana Public Service Commission.

Article 4, § 20 of the Louisiana Constitution of 1974 provides for a public service commission which:

> ". . . shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law."

Telephone companies are public utilities under the jurisdiction of the Louisiana Public Service Commission. See South Central Bell Telephone Co. v. Louisiana Public Service Commission, 352 So.2d 999 (La. 1977); R.S. 45:1161, 1164. Telephone companies are also subject to the provisions of R.S. Title 45, ch. 8 (45:781 et seq.)

Telephone service in Louisiana is served in some areas by South Central Bell, one of the Bell Operating Companies owned by AT&T, and in other areas by various independent telephone companies. Telephone companies are granted exclusive franchises to provide services within their assigned territories and therefore do not compete with one another for customers.

The public service commission regulates radio common carriers under the provisions of R.S. Title 45, Ch. 12 (45:1500 et seq.).

> "The Louisiana Public Service Commission shall exercise over and in relation to radio common carriers

the powers conferred by this Chapter." R.S. 45: 1500.

Radio common carrier is defined in 45:1501(C):

> "The term 'radio common carriers' when used in this Chapter includes every corporation, company, association, partnership and persons and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a radio common carrier or public 'for hire' radio service engaged in the business of providing a service of radio communications between mobile and base stations, between mobile and land stations, including land line telephone, between mobile stations or between land stations, *but not engaged in the business of providing a public land line message telephone service or a public message telegraph service.*" (Emphasis added).

R.S. 45:1501(D) continues:

> "Notwithstanding any provisions or R.S. 45:781 through 45:790 [telephones and telegraphs] inclusive, or any provision of this Chapter, *the term 'radio common carrier' as used in this Chapter shall not be construed to mean a company operating under the provisions of Title 45, Chapter 8, of the Louisiana Revised Statutes*, and no such radio common carrier shall have any of the powers, rights or duties provided for and prescribed by said Title 45, Chapter 8." (Emphasis added).

R.S. 45:1502 provides that rates and service shall be just, reasonable and not unduly preferential, and that the public service commission has the authority to issue rules, regulations and orders to govern rates and service.

R.S. 45:1503 requires a radio common carrier to obtain a certificate of public convenience and necessity be-

fore beginning operations in a new area (except for expanding an adjacent area not served by another radio common carrier). A radio common carrier holding a certificate is protected from competition from other radio common carriers by R.S. 45:1503(C):

> "The Commission shall not grant a certificate for a proposed radio common carrier operation or extension thereof which will be in competition with or duplication of any other radio common carrier unless it shall first determine that the existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonable adequate service."

Because land line telephone companies are specifically excluded from the provisions of the radio common carrier statute, the commission has not required land line telephone companies to request a certificate of public convenience and necessity to construct or operate land mobile communication facilities within their geographical area. However, the commission has indicated that where a land line telephone company seeks to operate land mobile communications equipment outside of its geographical area (for example, a south Louisiana telephone company intending to offer radio services in north Louisiana), a certificate from the commission would be required. See Order No. U-13727-A, James D. and Larry D. Garvey, d/b/a Radiofone v. Lafourche Telephone Company, April 19, 1979.

Neither of these two interpretations of the exclusion of land line telephone companies from the radio common carrier statute is challenged in this appeal. Rather, in the two orders presented for review, the land line telephone companies' transmitters, located within their geographical areas, have effective ranges which extend beyond the borders of the companies' land line service

areas. It is the competition for customers outside the land line service area that prompted the complaints to the public service commission.

3. The commission's orders

A. Southern Message Service, Inc. v. Cameron Telephone Company.

On December 26, 1979 Southern Message Service, Inc., a radio common carrier holding a certificate for the Lake Charles Area, filed a complaint with the commission alleging that Cameron Telephone Company, a land line telephone company serving areas of Cameron and Calcasieu Parishes (but not Lake Charles or Sulphur, which are served by South Central Bell), "has plans in progress for the constructing of a transmitter for a one way paging radio telephone service at Carlyss, Louisiana, in Calcasieu Parish which will provide a radio telephone paging service in the Lake Charles and Sulphur area to customers outside its wire area and in the area which plaintiff has a Certificate of Public Convenience and Necessity to serve." Cameron answered the complaint admitting that it had applied to the FCC for a construction permit to build transmitting facilities at Carlyss, "the location of which facilities is wholly within the service area authorized by [the public service commission]. Cameron Telephone Company intends to operate this paging system from its authorized service area and to provide service to the public within the radius of its service capabilities." The transmitter was planned for the 200 foot tower already existing at Carlyss.

The complaint was assigned Docket No. U-14506 and notice of the hearing was sent to the parties and published in the Louisiana Public Service Commission Official Bulletin No. 170, February 15, 1980 styled "In re: Alleged encroachment into territory served by complainant by constructing a radio transmitted at Carlyss, La., that will provide radio paging service into Lake Charles

and Sulphur, La." A hearing was held, and the commission thereafter issued Order No. U-14506 which read in part:

> "...
>
> It is the opinion of the Commission that Cameron is a public land line telephone company as stated In LRS 45:1501 C and D and under this statute, is not required to seek a certificate of public convenience and necessity to construct facilities within its exchange service area. It appears that the construction of an antenna at Carlyss will create competition to SMSI in a land line telephone company area presently assigned to South Central Bell Telephone Company at Lake Charles and Sulphur. It is therefore
>
> ORDERED that the respondent discontinue activities to provide radio common carrier services in territory outside of the geographical limits of its land line telephone system and that the respondents be notified that it may file application for a radio common carrier certificate pursuant to the provisions of LRS 45:1500, et seq."

Cameron Telephone requested and was granted a rehearing. The commission amended its Order No. U-14506 in Order No. U-14506-A:

> "...
>
> On rehearing, the Commission sustained the complaint of Southern Message Service, Inc. as it relates to a land line telephone company providing radio common carrier or paging service outside the geographical limits of its service area with the provision that land line telephone companies may provide radio common carrier and paging service to any person residing or domiciled within the geographical limits of the land line telephone company service area or subscribing to land line telephone service

from the telephone company providing the radio common carrier or paging service without having received a certificate of public convenience and necessity from the Commission. It is therefore

ORDERED that the complaint be sustained with the stipulation quoted above."

Cameron Telephone was thereby permitted to construct its transmitting facilities at Carlyss, but it was limited to serving its land line customers or persons residing or domiciled within the land line area unless it received a certificate from the commission. Unsatisfied with the amended order, Cameron Telephone Company filed a petition to set aside the commission's order sustaining the complaint of Southern Message Service, Inc.

B. Gulf Central International, Inc. v. Kaplan Telephone Company.

On April 21, 1980, after the commission had issued Order No. U-14506, Gulf Central International, Inc., the holder of a radio common carrier certificate for Abbeville, Louisiana, filed a complaint with the commission alleging that Kaplan Telephone Company was conducting radio common carrier services beyond its land line area. Kaplan answered the complaint, stating that its transmitter was located in the center of Kaplan and served customers both inside and outside the land line boundary, but that those outside the Kaplan area had to make a toll call to use the service. Kaplan contended it did not solicit customers outside its area and that it would be difficult to police users to determine if they were in or out of the boundary.

The complaint was assigned Docket No. U-14645 and notice of hearing was published in the Official Bulletin No. 201, April 24, 1971 styled: "In re: Alleged operation of radio common carrier services outside authorized land line telephone area." After a hearing, the commission issued Order No. U-14645. In the order, the com-

mission reviewed its previous orders concerning territorial disputes between land line telephone companies and radio common carriers in which it had limited telephone companies to operating facilities only within their land line boundaries and to serving only customers residing or domiciled within those boundaries or subscribing to their telephone service.

The commission then considered the statements it had made in its previous orders that a land line telephone company would have to seek a certificate of public convenience and necessity in order to provide services outside of its service area:

> "...
>
> The definition of 'radio common carrier' in R.S. 45:1501-C excludes businesses providing a public land line telephone message service, or a public message telegraph service. Because of this exclusion, the Legislature apparently did not intend for telephone companies to obtain a certificate from the Commission in order to provide radio telephone communications in conjunction with their land telephone operators. We do not believe, however, and so reaffirm our previous decision, that such exclusion would apply to facilities of a land line telephone company constructed outside its service area, or within its service area but at a location remote from an exchange office and on the periphery of its land line telephone system wherein the radio transmission facilities could not reasonably be presumed to have been designed to serve principally its land line telephone subscribers."

The commission determined that the land line boundary was not the appropriate standard for defining the service area of a radio-telephone system operated in conjunction with a land line telephone system, since radio waves could not be restricted to geographical boundaries.

"...

> It is, therefore, the conclusion of the Commission that the location of the radio transmitting tower effectively establishes the service area of the radio-telephone communications system operated by a land line telephone company, and that such services may be provided to any subscriber who believes that the effective range of the transmission will meet his needs. Since the radio-telephone communications are an integral part of the land line telephone system, the transmitting tower should be located at an exchange office or in close proximity thereto. Under these circumstances, such radio-telephone communications by a land line telephone company is exempt under the Radio Common Carrier law. These restrictions should provide adequate protection for the radio common carrier from an unwarranted intrusion into territory previously certificated to the radio common carrier by the Commission." [1]

The order further stated that existing towers in operation were "grandfathered", but new or additional services would have to comply with the requirements of the order or be covered by a certificate from the commission.

Cameron Telephone moved in the district court to remand its case to the commission for further proceedings consistent with the commission's order in Kaplan. The commission amended its Order No. U-14506-A to conform to its Order No. U-14645. Southern Message Service, Inc. and Gulf Central International, Inc. appealed their respective orders to the district court where the cases were consolidated. The Louisiana Telephone Association and East Ascension Telephone Company intervened, uniting with defendants, and Radiofone, Inc., a

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[1] Commissioner Schwegmann, concurring in the order, was of the opinion that there should be no restriction on the land line telephone company in the location of its radio transmitting tower. There were no other dissents or concurrences.

radio common carrier, intervened, joining with plaintiffs. In written reasons, the district court found the commission's orders were proper regulation of land line telephone companies and were not made in an arbitrary, capricious or abusive manner. From this decision plaintiffs sought a devolutive appeal to this court.

4. Issues on appeal

Each of the three plaintiffs raises the issue of the commissions' interpretation of the radio common carrier statute (R.S. 45:1500 et seq.) which allows land line telephone companies to provide radio services to customers outside their geographic land line areas. In addition, these applicants raise various issues relating to the manner in which the commission's orders were issued, including lack of adequate notice of the commission's change of policy and the denial of equal protection created by a dual standard applicable to telephone companies and radio common carriers. Finally, Southern Message Service, Inc. contends the commission deprived it of procedural due process of law in amending Order No. U-14506 after remand from the district court without providing notice or opportunity for Southern Message to be heard.

5. Merits

We take up first Southern Message Service, Inc.'s contention that it was deprived of procedural due process by the failure of the commission to conduct a hearing after remand of the Cameron Telephone order from the district court. The commission had held hearings on the complaint filed by Southern Message both after the complaint had been originally filed and after the commission granted Cameron Telephone's request for a rehearing. The litigants had the opportunity at both hearings to present whatever evidence they felt appropriate. There is no contention that due process had been violated up to this point.

After the case had been taken to the district court, the commission issued its order in the Kaplan Telephone case, reversing its position in the Cameron case. Cameron Telephone, plaintiff in the district court suit, moved to remand the case to the commission for further consideration in light of the commission's Kaplan decision, which was granted by the district court after hearing. Without a hearing before the commission, the commission amended its previous order in the Cameron case.

In support of its position, Southern Message relies on jurisprudence wherein administrative actions taken without the opportunity for a hearing were found to violate procedural due process. Tafaro's Investment Co., Inc. v. Division of Housing Improvement, 261 La. 183, 259 So. 2d 57 (1972) (no hearing afforded property owner prior to making repairs to bring building up to code standards and placing lien on property for such costs); Parker v. Board of Barber Examiners, 84 So.2d 80 (La. App. 1955) (disapproval of plaintiff's school without hearing); Vaughan v. Housing Authority of New Orleans, 80 So.2d 561 (La. App. 1955) (heirs not made party to suit could not be deprived of ownership rights acquired upon death of deceased).

We find these authorities inapplicable to Southern Message's situation. It was afforded two full hearings on its complaint to the commission. In remanding the case to the commission, the district court acted in a manner analogous to that required where new evidence is introduced in the district court. R.S. 45:1194[3] pro-

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[3] "If, upon the trial of any suit brought to contest any decision, act, rule, rate, charge, classification, or order, of the commission, the plaintiff introduces evidence which is found to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall send a transcript of such evidence to the commission, and stay proceedings in the suit for fifteen days from the date of such transmission. Upon the receipt of the transcript, the commis-

vides for remand to the commission of the transcript of any new evidence taken in the district court. Thereafter the commission has fifteen days in which to consider the evidence and it may alter, modify, amend or rescind its previous decision. R.S. 45:1195[3] provides that if the commission changes its decision, the "amended order shall take the place of the original order complained of and judgment shall be rendered thereon [by the district court], as though made by the commission in the first instance." See White v. Louisiana Public Service Commission, 259 La. 363, 250 So.2d 368 (1971).

The district court did not remand the present case due to any deficiency in the record. Rather, the court was informed of the commission's subsequent Order No. U-14645 and remanded the matter "for further proceedings and orders consistent" with that decision. Neither the above mentioned revised statutes nor the district court's order *requires* a hearing be held by the commission after a remand. Furthermore, the United States Supreme Court in Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 374 (1939), reviewing a remand order of the Court of Appeals, indicated that the consequences of the remand order would depend on the purpose for the remand and the state of the record:

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sion shall consider the evidence, and it may alter, modify, amend, or rescind its decision, act, rule, rate, charge, classification, or order, complained of in the suit and shall report its action to the court within fifteen days from the receipt of the transcript." R.S. 45:1194.

[3] "If the commission rescinds the order complained of, the suit shall be dismissed; if it alters, amends or modifies the order, the altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order is not rescinded or changed by the commission, judgment shall be rendered by the court upon the original order." R.S. 45:1195.

> "Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. . . . If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. . . ."

No additional findings of fact were required of the commission because of the district court's remand, as a complete record had been made in the prior hearings. It was therefore within the commission's discretion to rely on the existing record in reconsidering its order in light of its position in the Kaplan case. We find no abuse of the commission's discretion or denial of due process in the procedure followed subsequent to the remand order.

All three plaintiffs raise the issue of the commission's interpretation of the radio common carrier statute, R.S. 45:1500 et seq. Plaintiffs contend that the statute, by excluding land line telephone companies from its scope, prohibits land line telephone companies from operating radio common carrier services outside their land line areas, regardless of the location of the transmitting equipment. They argue that when the legislature passed the statute in 1968, it was with the knowledge that land line companies were not permitted to serve anyone other than their telephone customers, and, with that understanding, there was no need for such companies to apply for certificates from the commission. They contend that the legislative intent in providing for the commission to issue certificates was to avoid duplication and waste of resources, as evidenced by the requirement of showing inadequate service before a certificate would issue. Allowing telephone companies to compete for customers outside their areas without having to make such a showing, it is argued, is contrary to the legislative intent.

The telephone companies and the commission argue that the commission's interpretation of the radio common carrier statute's exemption of land line telephone companies from its scope is reasonable and consistent with the legislative purpose in exempting those companies. They argue that the legislative intent was to allow land line companies to provide the full range of telephone services, including radio services, to its customers without any barriers to market entry. To ensure that the radio services provided are designed to serve essentially the telephone companies' customers, the commission has required towers to be located at or near exchange offices. The public interest is then served by allowing anyone who feels the range of the transmitter meets his needs to make use of the service.

Under the settled jurisprudence of this court, the decisions of the commission are to be accorded great weight and are not to be disturbed unless found to be clearly erroneous, unsupported by the evidence, or an abuse of power. Southern Message Service, Inc. v. Louisiana Public Service Commission, 426 So.2d 606 (La. 1983); Monochem v. Louisiana Public Service Commission, 253 La. 1047, 221 So.2d 504 (1969). The decision required of the commission in these complaints involves complex matters having far-reaching effects on the radio communications industry, which it is mandated to regulate in the public interest. Where the special expertise of the commission is called into play, the courts should act slowly in substituting their own views for those of the expert body. Monochem v. Louisiana Public Service Commission, supra.

Plaintiffs' arguments that the passage of the radio common carrier statute with its exemption for land line telephone companies prohibited land line companies from offering radio service beyond their boundaries is not supported by a reading of the statute. The statute on its face deals only with radio common carriers. It does

not limit in any way the operations of land line telephone companies. However, the commission has not accepted the statute as completely exempting land line telephone companies. Rather, the commission has interpreted the statute as exempting land line companies from the certification requirements only when the company is dealing essentially with its own customers, that is, when operating facilities within its geographical boundaries. This view has been consistently held by the commission, as conceded by all parties to this litigation. This interpretation is a reasonable one, since where a land line telephone company seeks to operate outside its boundaries, it is no longer advancing the public policy of providing a full range of communications services to its customers. Therefore, the public policy evident in the radio common carrier statute against unnecessary competition and duplication of services supercedes the literal exemption granted to land line telephone companies. For this same reason, the commission has required that land line companies' transmitting towers may not be located at the edge of the land line boundary without certification. By limiting the location of uncertified towers, the commission has sought to provide adequate protection for a radio common carrier serving the area outside that land line company's boundaries.

The change in the commission's interpretation and application has come in the identity of those whom the land line telephone company is authorized to serve without certification. In the initial Cameron order, as amended on rehearing, the commission limited Cameron Telephone Company to serving only its customers or persons residing or domiciled in the land line area. The commission included no such limitation in its Kaplan order.

Gulf Central International, Inc., the complainant in the Kaplan case, attempted to show that Kaplan had used an Abbeville answering service and foreign ex-

change lines in connection with its paging services to eliminate toll calls for those using the pager service, and that pagers were being distributed out of that agency. Proof of these allegations was insufficient. Kaplan Telephone Company readily admitted, however, that it was providing paging services to customers residing outside the land line area. Kaplan's president testified:

> "My intent, sir, is to serve as a telephone company any request we are authorized to serve. We are not authorized to refuse service to anyone within whatever the government—under our regulations. If somebody walks into my office, and they want service, and we have it available or we are authorized to give them service, we're not supposed to refuse them. That has been the ruling of the Commission for years, the Public Service Commission."

The commission also heard testimony from several of Kaplan's beeper customers who did not live in the land line area. A welder testified that he did 90% of the welding work for the Kaplan area farmers, and that they had to use his beeper number to get in touch with him when they needed him. Representatives of a contractor and two trucking companies testified that they used Kaplan beepers to reach their employees while they are in the Kaplan area.

The commission therefore had before it evidence to support its conclusion that the public interest is served by allowing those who feel the range of the transmitter suits their needs to be permitted to make use of Kaplan Telephone Company's paging services. Each of the witnesses called by Kaplan testified that his business would be adversely affected if he were not permitted to utilize Kaplan's service. The commission has not acted arbitrarily in allowing other than land line customers to use land line company paging services. See Southern Message Service, Inc. v. Louisiana Public Service Commission,

supra; Louisiana Power & Light Co. v. Louisiana Public Service Commission, 358 So.2d 623 (La. 1978).

Plaintiff Radiofone's argument that the orders of the Commission violate equal protection of the laws is without merit. Radiofone insists that since a radio common carrier is required to obtain a certificate to serve the same area that a land line company may serve without a certificate, it is deprived of constitutional guarantees. The radio common carrier statute's entry requirements are applicable only to radio common carriers, and are applicable only when entry is sought into a geographic area already served by another radio common carrier. Whether the local land line telephone company is providing radio services in the area is irrelevant in determining whether services provided by radio common carriers are presently adequate. Likewise, a land line telephone company may under the restrictions included in the commission's orders, serve an area outside their boundaries regardless of whether a radio common carrier has been certified to serve that same area.

Radiofone relies on Frost v. Corporation Commission of Oklahoma, 278 U.S. 515 (1929), in which an Oklahoma provision requiring corporations to secure a certificate of public necessity before being permitted to operate a cotton gin but exempting collective farmer associations from showing such a public need was found to violate equal protection. The court found that the only distinction between the two types of organizations was the form of the business, which was not related to the purpose of the legislation, and was therefore not sufficient to support the different treatment accorded them. In this case, though radio communications provided by radio common carriers and land line telephone companies are essentially the same, there are real and substantial differences between the two types of companies. In enacting the radio common carrier statute, the legislature was careful about maintaining the distinction between them, both by exclud-

ing land line companies from the statute and in providing that "no such radio common carrier shall have any of the powers, rights or duties provided for and prescribed by said Title 45, Chapter 8." R.S. 45:1501(D). Frost v. Corporation Commission, supra, is clearly distinguishable.

Whenever there is less than full competition for customers, there will be differences in the treatment of market competitors. Plaintiffs have not borne their burden of showing the differences here are of constitutional proportions.

Having rejected plaintiffs' arguments that the orders of the commission in the Kaplan and Cameron cases are invalid, we now turn to plaintiffs' contentions that the orders should be vacated because the procedure employed by the commission in adopting the rule expressed in the orders did not properly protect the rights of radio common carriers and the general public. Plaintiffs suggest the rule should have been considered by the commission only after a full hearing on the issue following notice to those whose rights would be affected.

Louisiana Constitution article 4, § 21(B) provides that the commission ". . . shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties . . ." Our task on review is to consider the "reasonableness" of the commission's procedure. See Louisiana Consumers' League v. Louisiana Public Service Commission, 351 So.2d 128 (La. 1977).

Radiofone contends that the reversal of the established practice of the commission of limiting land line telephone companies to their geographic areas should not have been made in the format of an adjudicatory hearing. Rather, it is suggested that the commission should have followed its own Rule 47 which provides for formal public hearings where the commission finds that procedure appropriate.

Failure to conduct such a hearing, it is argued, constitutes an abuse of the commission's discretion.

We are not persuaded that the commission in fact had a long standing established practice of limiting land line telephone companies to serving only their own customers with radio services. The prior rulings cited by Radiofone deal with the use of facilities outside the land line area. Only in the Cameron and Kaplan cases was the issue whether nonsubscribers could be served by facilities within the geographical boundaries of the land line telephone companies. As to the form of the commission's procedure, there is no requirement that the public service commission develop rules governing the subjects under its jurisdiction through formal rule making rather than on a case by case basis. The variety of possible situations, as evidenced by the radio common carrier industry itself, often requires the more flexible procedure utilized by the commission in regulating this industry. The commission is in the best position, having regular contact with the subjects and problems in the industries under its jurisdiction, to determine the best method of rule development. We find no abuse of the commission's discretion in regulating the radio common carrier industry on a case by case basis.

Consistent with the case by case method of rule making employed by the commission, it has complied with the due process requirements applicable to the parties in the cases below. There was adequate notice and a hearing held. Through publication in the Official Bulletin, others would be apprised of the general subject matter of the proceeding, and their intervention would have been permitted under public service commission rules. Radiofone's arguments in brief, that it was a "party" whose rights were affected without notice and opportunity to be heard, would be applicable only if Radiofone had made itself a party through intervention before the commission.

6. Conclusion

The Louisiana Public Service Commission Orders No. U-14506-A and U-14645 are affirmed. Nothing in this opinion should be construed as prohibiting the commission from continuing in its efforts to develop appropriate rules for the regulation of the land mobile communications industry or to prohibit the radio common carrier industry from continuing its challenge to the present rules before the commission.

SUIT NO. 245,452, DIVISION "I"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CAMERON TELEPHONE COMPANY

vs.

LOUISIANA PUBLIC SERVICE COMMISSION and
SOUTHERN MESSAGE SERVICE, INC.

Consolidated With

SUIT NO. 251,352, DIVISION "I"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

GULF CENTRAL INTERNATIONAL, INC.

vs.

LOUISIANA PUBLIC SERVICE COMMISSION and
KAPLAN TELEPHONE COMPANY, INC.

WRITTEN REASONS FOR JUDGMENT

These consolidated cases come before the Court on appeals from two orders of the Louisiana Public Service Commission (LPSC) concerning territorial disputes between independent telephone companies and Radio Common Carriers certificated by the LPSC pursuant to LSA-R.S. 45:1500 et seq. (see Appendix "A"). The original appellant in suit number 245,452 was Cameron Telephone Company (Cameron) who was objecting to the ruling of the LPSC limiting their providing radio common carrier and paging service, without first obtaining a certificate of public convenience and necessity, to persons

who resided in or were domiciled within the geographical limits of their land line telephone service area or who subscribed to their land line telephone service.

Prior to the matter having reached a definitive decision in this Court, the LPSC decided the case of *Gulf Central International, Inc. vs. Kaplan Telephone Co., Inc.*, docket no. U-14645. There the LPSC determined that the Louisiana Legislature "did not intend for telephone companies to obtain a certificate from the Commission in order to provide radio telephone communication in conjunction with their land line telephone operators." However, the order required the telephone company to locate their radio transmitting tower "at an exchange office or in close proximity thereto." Failure to comply with these guidelines would require the telephone company to obtain a certificate of public convenience and necessity. Subsequent to this decision by the LPSC, this Court remanded the Cameron case to the Commission which issued an order in accordance with the Gulf Central case. Southern Message Service, Inc (Southern) then appealed this order. Gulf Central International, Inc. (Gulf Central) appealed order number U-14645 and these cases were consolidated for hearing on April 16, 1982. Oral argument was heard and the matter submitted with memoranda.

The issues in this matter are:

1. Are telephone companies who provide radio common carrier services required to obtain a certificate of public convenience and necessity? If not,

2. Was the decision of the LPSC in these matters arbitrary, capricious or abusive of the Commissioners' authority?

NECESSITY OF OBTAINING A CERTIFICATE

LSA-R.S. 45:1501(C) and (D) provide:

> C. The term "radio common carriers" when used in this Chapter includes every corporation, company,

association, partnership and persons and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a radio common carrier or public "for hire" radio service engaged in the business of providing a service of radio communications between mobile and base stations, between mobile and land stations, including land line telephones, between mobile stations or between land stations, *but not engaged in the business of providing a public land line message telephone service or a public message telegraph service.*

D. Notwithstanding any provisions of R.S. 45:781 through 45:790 inclusive, or any provision of this Chapter, the term "radio common carrier" as used in this Chapter *shall not be construed to mean a company operating under the provisions of Title 45, Chapter 8, of the Louisiana Revised Statutes,* and no such radio common carrier shall have any of the powers, rights or duties provided for and prescribed by said Title 45, Chapter 8. (Emphasis added.)

The Court is of the opinion that wire line telephone companies are excluded from the purview of the Radio Common Carrier Statute (R.S. 45:1500 et seq.). The language of this statute reflects the legislative intent to make such an exclusion.

It is argued by the radio common carriers appealing the decisions of the LPSC that such a holding would:

1. Allow telephone companies to construct a radio transmitting tower anywhere within the State of Louisiana, and

2. Allow "massive cross-subsidization" between the telephone companies profits derived from land line operations and radio carrier services operations.

The Court does not find merit in these arguments for the following reasons.

The Louisiana Constitution of 1974, Article 4, Section 21(B) provides:

> (B) Powers and Duties. The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

It is clear from this constitutional mandate that the LPSC shall regulate all public utilities and common carriers. The Commission has stated in *Gulf Central International, Inc. vs. Kaplan Telephone Company, Inc., supra*, that any radio transmitting tower erected by the telephone company must be "located at an exchange office or in close proximity thereto . . . New or additional services must meet the criteria of this order or, otherwise, the telephone company should apply for and obtain a Certificate of Public Convenience and Necessity." Therefore, telephone companies are regulated as to the possible locations of their transmiting tower.

If the LPSC determines that cross-subsidizing by the telephone companies is a problem, it has the authority and indeed the duty under the Louisiana Constitution of 1974 to promulgate regulations to prevent such a practice. Thus these arguments do not prevent the determination by this Court that R.S. 45:1500 et seq. is not applicable to telephone companies. Consequently, it is not necessary for telephone companies to obtain a Certificate of Public Convenience and Necessity prior to commencing radio common carrier services, however, there must be full compliance with the LPSC orders and regulations.

WAS THE DECISON OF LPSC ARBITRARY, CAPRICIOUS OR AN ABUSE OF AUTHORITY?

It is the opinion of the radio common carriers who are attacking the above mentioned orders of the LPSC that the Commissioner did not utilize a proper procedure for making the change in regulations concerning placement of radio transmitting towers by the telephone companies. They argue the LPSC should have held a hearing where interested parties could have introduced evidence and argued the matter before the Commissioner prior to a decision of such magnitude being rendered.

The opinion issued by the LPSC was formulated after an adjudicatory hearing in which any affected or interested party could have intervened. Consequently, the fact that the Commission did not hold a hearing but instead changed the LPSC's previous rulings via an order does not in and of itself constitute an abuse of the LPSC discretion or authority.

The argument that the order is arbitrary and capricious is equally without merit inasmuch as there has been no showing that the order was defective other than for those arguments mentioned previously. The decision of the LPSC was a proper regulation of the telephone companies under the Commission's plenary power. The order will be upheld as written.

Judgment will be signed accordingly.

Baton Rouge, Louisiana, this 8 day of June, 1982.

/s/ [Illegible]
Judge

[Filed Jun. 8, 1982]

/s/ Kris Hursey

APPENDIX "A"

CHAPTER 12. RADIO COMMON CARRIER [NEW]

§ 1500. Regulation of radio common carriers

The Louisiana Public Service Commission shall exercise over and in relation to radio common carriers the powers conferred by this Chapter.

§ 1501. Definitions

A. The word "commission" when used in this Chapter means the Louisiana Public Service Commission.

B. The word "commissioners" when used in this Chapter means the commissioners of the Louisiana Public Service Commission.

C. The term "radio common carriers" when used in this Chapter includes every corporation, company, association, partnership and persons and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a radio common carrier or public "for hire" radio service engaged in the business of providing a service of radio communications between mobile and base stations, between mobile and land stations, including land line telephones, between mobile stations or between land stations, but not engaged in the business of providing a public land line message telephone service or a public message telegraph service.

D. Notwithstanding any provisions of R.S. 45:781 through 45:790 inclusive, or any provision of this Chapter, the term "radio common carrier" as used in this Chapter shall not be construed to mean a company operating under the provisions of Title 45, Chapter 8, of the Louisiana Revised Statutes, and no such radio common carrier shall have any of the powers, rights or duties provided for and prescribed by said Title 45, Chapter 8.

§ 1502. Rates; service; rules and regulations

The rates of every radio common carrier shall be just, reasonable, and not unduly preferential; the service of every such carrier shall be adequate and not unduly preferential, and the rules and regulations of every such carrier shall be just, reasonable and not unduly preferential. It shall be the duty of the commissioners to prescribe appropriate rules and regulations, and to make such orders as may be necessary and proper, to insure that such radio common carrier rates, services, rules and regulations are reasonable, just, adequate and not unduly preferential.

§ 1503. Certificate of public convenience and necessity; exceptions

A. No radio common carrier shall begin, or continue, the construction or operation of any mobile radio system, or any extension thereof, or acquire ownership or control thereof either directly or indirectly without first obtaining from the public utilities commission a certificate that the present or future public convenience and necessity requires or will require such construction, operation or acquisition; provided this Chapter shall not require, nor shall it be so construed as to require, any such carrier to secure a certificate for an extension within any municipality within which such person has heretofore lawfully commenced operations, or for any extension within or to territory already served by such carrier, necessary in the ordinary course of business, or for substitute facilities within or to any municipality or territory already served by such carrier, or for any extension into territory contiguous to that already served by such carrier and not receiving similar service from another such carrier when no certificate of convenience and necessity has been issued to or applied for by any other radio common carrier, or for the acquisition and operation of any plant or system heretofore constructed or hereafter constructed under au-

thority of a certificate of convenience and necessity hereafter issued. The commissioners are hereby authorized to prescribe appropriate and reasonable rules and regulations governing the issuance of such certificates.

B. Any person engaged in the construction or operation of any radio common carrier on July 31, 1968 shall receive a certificate of convenience and necessity from the Louisiana Public Service Commission authorizing such person to continue the construction or operation of such radio common carrier in the territory professed to be served by such person on July 31, 1968 if, within sixty days after July 31, 1968, such person shall file with the commission an application for such certificate, including copies of any license or licenses issued by the Federal Communications Commission to such person, showing the area professed to be served by such person.

C. The commission shall not grant a certificate for a proposed radio common carrier operation or extension thereof which will be in competition with or duplication of any other radio common carrier unless it shall first determine that the existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonable adequate service.

§ 1504. Interconnection with telephone facilities

Each radio common carrier holding a certificate from the commission may interconnect its common carrier radio telephone facilities with the telephone facilities of the telephone company serving the area in which the base station of the radio common carrier is located, provided an agreement can be reached betwen the radio common carrier and the serving telephone company providing for such interconnection; provided further, that when an agreement cannot be reached between the radio common

carrier and the serving telephone company, the radio common carrier may petition the commission for the right of interconnection and if the commission finds that a necessity exists therefor, such interconnection shall be ordered by the commission on such reasonable terms as shall be set by the commission.

SUIT NO. 245,452, DIVISION "I"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CAMERON TELEPHONE COMPANY

vs.

LOUISIANA PUBLIC SERVICE COMMISSION and
SOUTHERN MESSAGE SERVICE, INC.

Consolidated With

SUIT NO. 215,352, DIVISION "I"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

GULF CENTRAL INTERNATIONAL, INC.

vs.

LOUISIANA PUBLIC SERVICE COMMISSION and
KAPLAN TELEPHONE COMPANY, INC.

JUDGMENT

These consolidated cases were fixed and duly came on for hearing on appeal from two orders of the Louisiana Public Service Commission on May 27, 1982.

Present: Jerry G. Jones of the firm of Jones, Jones & Alexander, Attorney for Respondent, Cameron Telephone Company; Marshall B. Brinkley, Attorney for Respondent, Louisiana Public Service Commission; Carlos G. Spaht of the firm Kantrow, Spaht, Weaver and Walter, Attorney for Petitioner, Southern Message Service, Inc.; Patrick H. Juneau, Jr. of the firm of Voorhies and Labbe,

Attorney for Petitioner, Gulf Central International, Inc.; Tom F. Phillips and James L. Ellis of the firm of Taylor, Porter, Brooks and Phillips, Attorneys for Respondent, Kaplan Telephone Company, Inc.; William R. Boles, Jr. of the firm of Boles and Mounger, Attorney for Intervenor, Louisiana Telephone Association; Ashton R. Hardy of the firm of Jones, Walker, Waechter, Poitevent, Carrére and Denégre, Attorneys for Intervenor, Radiofone, Inc.; and Guy Holdridge of the firm of Crawford, St. Amant and Holdridge, Attorney for the East Ascension Telephone Company, Inc.

The Court having considered the law, the evidence and the arguments of counsel and for written reasons assigned, on June 8, 1982:

IT IS ORDERED, ADJUDGED AND DECREED that Louisiana Public Service Commission Order No. U-14506-A, as amended on October 26, 1981, and Louisiana Public Service Commission Order No. U-14645 entered on August 4, 1981 be and the same are hereby upheld and affirmed as written.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of these proceedings be and the same are hereby assessed in the amount of one-half (½) each to Southern Message Service, Inc. and Gulf Central International, Inc.

Judgment rendered for written reasons assigned on June 8, 1982.

Judgment read and signed in open court at Baton Rouge, Louisiana this 3rd day of Dec. 1982.

/s/ William H. Brown
WILLIAM H. BROWN
District Judge Division "I"

/s/ James L. Ellis
JAMES L. ELLIS

/s/ William R. Boles, Jr.
WILLIAM R. BOLES, JR.
Approved as to Form only

/s/ Ashton R. Hardy
ASHTON R. HARDY

/s/ Guy Holdridge
GUY HOLDRIDGE

/s/ Jerry G. Jones
JERRY G. JONES

/s/ Marshall B. Brinkley
MARSHALL B. BRINKLEY

/s/ Carlos G. Spaht
CARLOS G. SPAHT

/s/ Patrick H. Juneau, Jr.
PATRICK H. JUNEAU, JR.

/s/ Tom F. Phillips
TOM F. PHILLIPS

[Filed Dec. 8, 1982]

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-14506

DOCKET NO. U-14506

SOUTHERN MESSAGE SERVICE, INC.

versus

CAMERON TELEPHONE COMPANY

In re: Alleged encroachment into territory served by complainant by constructing a radio transmitter at Carlyss, La., that will provide radio paging service into Lake Charles and Sulphur, La.

In this proceeding Southern Message Service, Inc. (SMSI), complains that the construction of a radio tower and transmitter by Cameron Telephone Company (Cameron) at Carlyss, Louisiana will encroach into SMSI service area at Lake Charles and Sulphur. SMSI is a radio common carrier now offering paging and mobile radio service at these locations.

The matter was heard by Hearing Examiner Edward L. Gallegos on February 25, 1980.

Witness Leo Wiman, SMSI, testified that his company offers one and two way paging at Lake Charles and that his equipment can serve up to 10,000 customers. He feels that Cameron will solicit customers in Lake Charles and Sulphur and these customers will be able to reach the Carlyss tower and transmit without paying tolls. He further testified that Cameron will be able to extend its service area beyond the boundaries assigned to its wire land service.

Witness Floy N. Shipley, Arlington, Texas was accepted as an expert on radio antennas. He testified that

a study of the Carlyss antenna indicates that signals from this facility can be received at 28 miles from the antenna instead of 9.5 miles. If pager is within a building, the signal may be reduced from 28 miles to some 12 miles.

Witness Mrs. Green testified that SMSI has approximately 700 pagers in the Lake Charles area and is equiped to handle many more. She stated that the Company has not received any complaints of inadequate service. The rates originally established are still in effect and any loss of business will cause losses in revenue.

Witness William H. Henning, Cameron Telephone Company, testified that it is his Company's intention to serve all customers requesting service within range of his transmitter. Cameron now offers mobile radio service and plans to offer tone and voice paging at a cost of $24 per month. Those prospects not able to reach the Carlyss transmitter without toll charges will be required to pay toll. Mr. Henning further testified that Cameron has applied to Federal Communications Commission for radio frequencies assigned to land line telephone companies.

Mr. Jerry G. Jones, Attorney for Cameron, gave closing argument and stated that Cameron plans to construct a tower and transmitter within its assigned wire line area (exchange service area). The signal generated by that station will extend outside of this assigned wire line area.

Mr. Carlos Spaht, Attorney for SMSI argued that the legislative act did not intend for land line telephone companies to be allowed to operate outside its wire line area.

It is the opinion of the Commission that Cameron is a public land line telephone company, as stated in LRS 45:1501 C and D and under this statute, is not required to seek a certificate of public convenience and necessity to construct facilities within its exchange service area. It appears that the construction of an antenna at Carlyss

will create competition to SMSI in a land line telephone company area presently assigned to South Central Bell Telephone Company at Lake Charles and Sulphur. It is therefore

ORDERED that the respondent discontinue activities to provide radio common carrier services in territory outside of the geographical limits of its land line telephone system and that the respondent be notified that it may file application for a radio common carrier certificate pursuant to the provisions of LRS 45:1500, et seq.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
MARCH 27, 1980

/s/ Ed Kennon
Chairman

/s/ Thomas E. Powell
Vice Chairman

/s/ Louis J. Lambert, Jr.
Commissioner

_____
Commissioner

/s/ Louis S. Dunn
Secretary

/s/ George J. Ackel
Commissioner

Mailing List

Leo Wiman, President, Southern Message Service, Inc., 709 Crockett St., Shreveport, La. 71102

Carlos G. Spaht, P.O. Box 2997, Baton Rouge, La. 70821

William L. Henning, President, Cameron Telephone Company, P.O. Box 167, Sulphur, La. 70663

Jerry G. Jones, Attorney, P.O. Drawer M, Cameron, La. 70631

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-14506-A
(AMENDED)

DOCKET NO. U-14506

SOUTHERN MESSAGE SERVICE, INC.

versus

CAMERON TELEPHONE COMPANY

In re: Alleged encroachment into territory served by complainant by constructing a radio transmitter at Carlyss, Louisiana, that will provide radio paging service into Lake Charles and Sulphur, Louisiana.

In this proceeding Southern Message Service, Inc. (SMSI) complained that the construction of a radio tower and transmitter by Cameron Telephone Company (Cameron) at Carlyss, Louisiana, will encroach into SMSI service area at Lake Charles and Sulphur. SMSI is a radio common carrier now offering paging and mobile radio service at these locations.

The matter was heard by Hearing Examiner Edward L. Gallegos on February 25, 1980, and taken under advisement. The Commission subsequently issued its Order No. U-14506, dated March 27, 1980 and Order No. U-14506-A, dated January 9, 1981 upon rehearing. The SMSI complaint was sustained as it relates to a land line telephone company providing radio common carrier or paging service outside the geographical limits of its service area with the proviso that the service can be provided to any person residing or domiciled within the geographical limits of the telephone company service area

or subscribing to telephone service from the telephone company.

This matter was appealed to the 19th Judicial District Court in its Docket No. 245,452. The matter was subsequently remanded to this Commission for further consideration in light of the Commissions holding in its Docket and Order No. U-14645, Gulf Central International, Inc. versus Kaplan Telephone Company.

The remand was considered by the Commission in its Open Session held October 19, 1981 and,

ORDERED that Order No. U-14506-A is hereby amended to conform to the Commission's decision in Order No. U-14645 setting forth the condition under which a land line telephone company can provide "for hire" radio telecommunications without obtaining a certificate of public convenience and necessity from this Commission.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
OCTOBER 26, 1981

/s/ Ed Kennon
Chairman

/s/ Thomas E. Powell
Vice Chairman

_____
Commissioner

/s/ John F. Schwegmann
Commissioner

/s/ George J. Ackel
Commissioner

/s/ Louis S. Dunn
Secretary

Service List

Leo Wiman, President, Southern Message Service, Inc., 709 Crockett Street, Shreveport, La. 71102

Carlos G. Spaht, Attorney at Law, P.O. Box 2997, Baton Rouge, La. 70821

William L. Henning, President, Cameron Telephone Company, P.O. Box 167, Sulphur, La. 70663

Jerry G. Jones, Attorney at Law, P.O. Drawer M, Carmeron, La. 70631

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-14645

DOCKET NO. U-14645

GULF CENTRAL INTERNATIONAL, INC.

versus

KAPLAN TELEPHONE COMPANY, INC.
(KAPLAN, LOUISIANA)

In re: Alleged operation of radio common carrier services outside authorized land line telephone area.

This is the fourth in a series of territorial complaints between Radio Common Carriers certificated by this Commission pursuant to the provisions of LSA-R.S. 45:1500 et seq. and an independent telephone company concerning radio mobile phone and paging communications.

In the first of these cases, Radiofone protested the proposed action of Lafourche Telephone Company to provide paging services in the Thibodaux area through the use of a transmitting tower to be located outside the geographical area of Lafourche's land line telephone service. The Commission sustained the complaint upon a finding that Radiofone held a certificate for operations in Houma and Thibodaux is within the 43 dBu contour recognized by the Federal Communciations Commission as the effective range of mobile telephone and paging transmissions, and the Radio Common Carrier statute did not contemplate that a telephone company could construct such facilities outside its assigned land line telephone boundaries.

In the second proceeding, Lafourche Telephone Company complained of the failure of Radiofone to obtain a Certificate of Public Convenience and Necessity to operate as a common carrier in the Thibodaux, Bayou Blue, and Houma areas. This complaint was dismissed upon

the finding that Radiofone had constructed its facilities at Houma prior to the passage of the Radio Common Carrier Act by the Louisiana Legislature. Therefore, its common carrier operations were "grandfathered" under the provisions of R.S. 45:1503-B. Additionally Thibodaux and Bayou Blue fall within the 43 dBu contour of effective transmission, and, are contiguous areas as sanctioned in the Radio Common Carrier statute.

In the third case, Southern Message Service, Inc. complained that the construction of a radio tower by Cameron Telephone Company at its Carylss office would encroach into Southern Message Service, Inc.'s service area in Sulphur and Lake Charles. The initial decision of the Commission ordered Cameron Telephone Company to discontinue radio common carrier activities outside the geographical limits of its land line telephone system. After rehearing, however, the Commission modified this Order by holding that Cameron could provide such service to anyone who resided in its land line service area or who subscribed to a telephone from Cameron Telephone Company.

In each case, the Commission noted that the telephone company could apply for a Radio Common Carrier Certificate if it desired to provide service beyond the limits of its land line telephone service area.

The present case is virtually identical to the Cameron-Southern Message Service case with the exception that Kaplan's tower has been in operation for a number of years, and, has provided services for a number of subscribers who neither live in the Kaplan service area nor subscribe to telephone from Kaplan Telephone Company.

The definition of "radio common carrier" in R.S. 45:1501-C excludes businesses providing a public land line telephone message service, or a public message telegraph service. Because of this exclusion, the Legislature apparently did not intend for telephone companies to obtain a certificate from the Commission in order to

provide radio telephone communications in conjunction with their land line telephone operators. We do not believe, however, and so reaffirm our previous decision, that such exclusion would apply to facilities of a land line telephone company constructed outside its service area, or within service area but at a location remote from an exchange office and on the periphery of its land line telephone system wherein the radio transmission facilities could not reasonably be presumed to have been designed to service principally its land line telephone subscribers.

The Commission does, however, take cognizance of the direction of radio channel assignments by the Federal Communications Commission specifically reserved to telephone companies and radio common carriers, and the fact that in the Radiofone-Lafourche cases, the Commission accepted the geographical limitations on the effective range of such radio-telephone and paging transmissions by virtue of the Federal Communications Commission's 43 dBu contour configuration of the assigned channel frequency. The Commission also recognizes that the service area of a radio-telephone system operated in conjunction with a land line telephone system must be judged upon different criteria than the service area of the land line telephone system since radio waves cannot be restricted to geographical boundaries.

It is, therefore, the conclusion of the Commission that the location of the radio transmitting tower effectively establishes the service area of the radio-telephone communications system operated by a land line telephone company, and that such services may be provided to any subscriber who believes that the effective range of the transmission will meet his needs. Since the radio-telephone communications are an integral part of the land line telephone system, the transmitting tower should be located at an exchange officer or in close proximity thereto. Under these circumstances, such radio-telephone communications by a land line telephone company is exempt under the Radio Common Carrier law. These

restrictions should provide adequate protection for the radio common carrier from an unwarranted intrusion into territory previously certificated to the radio common carrier by the Commission.

Since the initial complaint did not commence until land line telephone companies proposed construction of additional towers for radio telephone communications which the Commission has enjoined all existing towers in operation by land line telephone companies are grandfathered. New or additional services must meet the criteria of this order or, otherwise, the telephone company should apply for and obtain a Certificate of Public Convenience and Necessity.

Accordingly, the complaint of Gulf Central International, Incorporated is DISMISSED.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
AUGUST 4, 1981

/s/ Ed Kennon
Chairman

/s/ Thomas E. Powell
Vice Chairman

/s/ Louis J. Lambert, Jr.
Commissioner

/s/ George J. Ackel
Commissioner

/s/ John F. Schwegmann
Commissioner

Commissioner Schwegmann concurs but is of the opinion that there should be no restriction on the land line telephone company in the location of its radio transmitting tower.

/s/ Louis S. Dunn
Secretary

SUPREME COURT OF LOUISIANA
New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #136

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 9th day of December, 1983, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

83-CA-0037	Cameron Telephone Co. v. Louisiana Public Service Commission, et al, C/W Gulf Central International Inc. vs. Louisiana Public Service Commission, et al. (Two Applications) DENNIS, BLANCHE & LEMMON, J.J. would grant a rehearing.
83-KD-1392 and 83-KD-1393	State v. Don Jordan CALOGERO, DENNIS & LEMMON, J.J. would grant; [LEMMON, J., would grant on use of uncounselled plea]

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